

**Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v
Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor**

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–46–07 OF
2015(W)
ARIFIN ZAKARIA CHIEF JUSTICE, SURIYADI, AZAHAR
MOHAMED, ZAHARAH IBRAHIM FCJJ AND BALIA YUSOF JCA
10 MARCH 2017

*Labour Law — Trade union — Registration — Director-General of Trade
Unions ('DG') registered in-house trade union of non-executive employees of
commercial bank without hearing or consulting any other interested party — DG
was of view he had absolute unfettered discretion under s 12(1) of the Trade Union
Act 1959 ('the TUA 1959') to register union — National Union of Bank
Employees ('NUBE') applied to quash the DG's decision for breaching his statutory
duty under s 12 of the TUA 1959 — Whether DG had statutory duty under s 12
to consult with all industry players, including NUBE, before deciding to register
— Whether DG's failure to do so rendered his decision to register trade union null
and void*

*Statutory Interpretation — Construction of statutes — Purposive approach
— Trade Union Act 1959 ('the TUA 1959'), s 12 — Whether whole of s 12
containing three subsections had to be read together to determine purport and design
of that section — Whether literal interpretation of s 12(1) alone led to wrong
proposition that Director-General of Trade Unions ('DG') was not required to make
any prior consultation with interested parties before deciding to register trade union
— Whether use of word 'may' in two of subsections in s 12 did not give DG absolute
unfettered discretion to register or not — Whether s 12(2) of the TUA 1959 had to
be interpreted liberally — Whether s 12 read as whole imposed duty on DG to
consult all relevant parties before deciding whether or not to register trade union*

Pursuant to s 12 of the Trade Union Act 1959 ('the TUA 1959') the
Director-General of Trade Unions (the second respondent and hereafter
referred to as 'the DG')) registered the appellant as an in-house trade union of
non-executive employees of Malayan Banking Bhd ('MBB'). The first
respondent ('NUBE') filed an appeal to the DG under s 71A of the TUA 1959
to cancel the said registration. When it failed to get any response to its appeal,
NUBE applied for judicial review to quash the DG's decision on the ground:
(a) the DG had, in breach of the principle of natural justice, failed to give
NUBE an opportunity to be heard before registering the appellant as a trade
union; and (b) the DG had failed to take into account the fact that there would

- A be an overlapping or duplication of the appellant's membership with that of the NUBE since there were NUBE members who were MBB employees enjoying the terms and benefits of a collective agreement entered into between NUBE and the Malaysian Commercial Banks Association. The High Court dismissed the judicial review application on the ground s 12(2) of the TUA 1959 gave the
- B DG wide discretion whether or not to allow the registration and there was no provision requiring the DG to consult any party before he decided to register. On appeal, the Court of Appeal ('COA') unanimously quashed the DG's decision and set aside the appellant's registration ruling that there was gross failure on the DG's part in complying with s 12 of the TUA 1959. The COA
- C held that s 12 had to be read as a whole and it placed an investigative role on the DG before he could decide whether or not to register a trade union. In the instant case, a relevant factor the DG should have been considered was whether it was necessary to have another trade union representing workmen in MBB
- D when the NUBE already existed. The COA said the DG was duty-bound under s 12(2) and (3) of the TUA 1959 to give notice to all necessary and interested parties to obtain their feedback in order to decide whether or not to register. The COA held that common sense and the rule of natural justice dictated that NUBE's views should have been heard before the decision to register was made. The COA held that the failure to strictly comply with the statutory obligations set out in s 12 rendered the decision or decision-making process a nullity ab initio. In the instant appeal against the COA's decision, the appellant was granted leave to pose the question whether when considering a new trade union's application for registration, the DG was statutorily required
- E under s 12 of the TUA 1959 to consult with any existing trade union that already represented workmen in the particular establishment, trade, occupation or industry which the new trade union sought to represent. Inter alia, the appellant submitted that the COA should not have departed from its own previous decision in *Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2014] MLJU 1885 ('the ABOM case') where it was held that the DG had no obligation under s 12 of the TUA 1959 to consult the NUBE before registering ABOM as a trade union although NUBE was a national union representing the same category of employees that ABOM sought to represent. NUBE replied that the COA was not bound to follow the ABOM case because it was decided per incuriam. NUBE also submitted that the DG's view that he had absolute discretion under s 12 of the TUA 1959 to register a trade union without consulting any party was an affront to natural justice, as was his failure to give
- F a reason for his decision.
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Held, dismissing the appeal, affirming the COA's decision and answering the leave question in the affirmative:

- (1) In the circumstances of the case under which the discretion was exercised by the DG in registering the appellant as a trade union, the provisions of s 12 of the TUA 1959 were not complied with (see para 91). A
- (2) In exercising his powers and/or discretion and making a decision under s 12 of the TUA 1959, the DG had to have a reason for that decision. It was not a fanciful decision and the discretion could never be exercised willy-nilly. Being in that position, it was reasonable and appropriate to imply that the DG ought to have given a reason for his decision. He did not do so for he was under the erroneous belief (as stated in his affidavit in reply) that he had absolute and unfettered discretion ('kuasa budi bicara yang mutlak'). He had not. There was a need for further deliberation and consideration by the DG before he arrived at his decision. There was already an existing trade union representing and catering for the same particular industry workmen (ie, the NUBE) and it ought to have dawned upon the DG that a multiplicity of trade unions in respect of the same occupation was not in the best interests of industrial harmony. The DG's satisfaction under s 12 of the TUA 1959 in deciding whether to register another trade union in the same industry could not be achieved without there being a prior consultation with the other players in the industry. NUBE had an interest in the registration of the appellant and a legitimate and reasonable expectation to be heard on the appellant's application but it was denied that right. In the circumstances of the case, the failure to consult NUBE was fatal (see paras 85 & 90). B
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- (3) In interpreting s 12 of the TUA 1959, taking the literal method of interpretation was misplaced. An interpretation which met the purport and design of s 12 ought to have been considered. It was a cardinal rule of interpretation of statutes that the provision had to be read as a whole. Section 12 of the TUA 1959 consisted of three subsections and they had to be read together and as a whole. To read sub-s (1) in isolation would lead to an unnatural meaning to that provision. It was not a correct proposition of law to say that s 12(1) did not require consultation before the DG could exercise his discretion. Section 12(2) of the TUA 1959 had to be liberally interpreted by the courts. While the word 'shall' appeared in sub-s (3), the use of the word 'may' in the other two subsections did not give a free hand to the DG in the exercise of discretion whether or not to register. The decision whether or not to allow registration involved some weighing and consideration of various factors. Reading sub-s (2), it only made sense that the DG had to be satisfied of a certain fact before he could act. In order to be satisfied, it again only made sense that he had to consult the relevant parties including those likely to be affected by his allowing or refusing the application (see paras 56–57 & 69–70). F
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- (4) The COA did not err in departing from its earlier decision in the *ABOM* case. When the COA decided the *ABOM* case, at least two other earlier

- A decisions, one by the COA and another by the Supreme Court, which were both binding on the COA, were not brought to its attention and were never considered or referred to. As such, the COA's decision in the *ABOM* case was clearly per incuriam in ignorance of those two earlier binding decisions. In the present case, when faced with a situation where
- B there were conflicting decisions, the COA was entitled to depart from its decision in *ABOM* and rely on the two earlier decisions if it chose to do so. It did. And in doing so, it did not breach the doctrine of stare decisis (see para 48).
- C **[Bahasa Malaysia summary]**
- Menurut s 12 Akta Kesatuan Sekerja 1959 ('AKS 1959') Ketua Pengarah Kesatuan Sekerja (responden kedua dan selepas ini dirujuk sebagai 'KP') telah mendaftarkan perayu sebagai kesatuan sekerja dalaman untuk para pekerja bukan eksekutif Malayan Banking Bhd ('MBB'). Responden pertama
- D ('NUBE') telah memfailkan rayuan kepada KP di bawah s 71A AKS 1959 untuk membatalkan semakan semula bagi membatalkan keputusan KP atas alasan: (a) KP telah, melanggar prinsip keadilan asasi, gagal, memberikan NUBE peluang untuk didengar sebelum mendaftarkan perayu sebagai kesatuan sekerja; dan (b) KP telah gagal mengambil kira fakta bahawa terdapat
- E penindihan atau duplikasi keahlian perayu dengan NUBE kerana terdapat ahli-ahli NUBE yang merupakan pekerja-pekerja MBB yang menikmati terma-terma dan faedah perjanjian kolektif yang dimasuki antara NUBE dan Malaysian Commercial Banks Association. Mahkamah Tinggi telah menolak permohonan semakan kehakiman atas alasan s 12(2) AKS 1959 memberikan
- F KP budi bicara yang luas sama ada atau tidak untuk membenarkan pendaftaran itu dan tiada peruntukan yang menghendaki KP berunding dengan mana-mana pihak sebelum beliau memutuskan untuk mendaftar. Atas rayuan, Mahkamah Rayuan ('MR') sebulat suara telah membatalkan keputusan KP dan mengetepikan pendaftaran perayu dengan memutuskan bahawa terdapat
- G kegagalan yang melampau di pihak KP untuk mematuhi s 12 AKS 1959. MR telah memutuskan bahawa s 12 perlu dibaca secara keseluruhan dan ia memainkan peranan penyiasatan ke atas KP sebelum beliau boleh memutuskan sama ada atau tidak untuk mendaftar suatu kesatuan sekerja. Dalam kes ini, faktor yang relevan yang mana patut dipertimbangkan KP
- H adalah sama ada ia perlu untuk satu lagi kesatuan sekerja mewakili pekerja MBB apabila NUBE telahpun wujud. MR mengatakan KP terikat dengan kewajipan di bawah s 12(2) dan (3) AKS 1959 untuk memberikan notis kepada semua pihak-pihak yang berkepentingan untuk memperoleh maklumbalas mereka bagi tujuan memutuskan sama ada atau tidak untuk
- I mendaftar. MR memutuskan bahawa akal dan rukun keadilan asasi mengatakan pendapat NUBE patut didengar sebelum keputusan untuk mendaftar dibuat. MR memutuskan bahawa kegagalan untuk mematuhi dengan ketat tanggungjawab statutori yang dinyatakan dalam s 12 menyebabkan keputusan atau proses membuat keputusan terbatal ab initio.

Dalam rayuan ini terhadap keputusan MR, perayu telah memberikan kebenaran untuk mengemukakan persoalan sama ada apabila mempertimbangkan permohonan kesatuan sekerja baharu untuk pendaftaran, KP dikehendaki secara statutori di bawah s 12 AKS 1959 untuk berunding dengan mana-mana kesatuan sekerja sedia ada yang telahpun mewakili pekerja dalam penubuhan, perdagangan, pekerjaan atau industri yang mana kesatuan perdagangan baru mahu mewakili. Antara lain, perayu berhujah bahawa MR tidak patut berbeza daripada keputusan terdahulunya yang sendiri dalam kes *Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2014] MLJU 1885 ('kes ABOM') di mana ia diputuskan bahawa KP tiada tanggungjawab di bawah s 12 AKS 1959 untuk berunding dengan NUBE sebelum mendaftarkan ABOM sebagai kesatuan sekerja meskipun NUBE adalah satu kesatuan kebangsaan yang mewakili kategori sama pekerja bahawa ABOM mohon untuk mewakili. NUBE menjawab bahawa MR tidak terikat untuk mengikut kes ABOM kerana ia telah diputuskan per incuriam. NUBE juga berhujah bahawa pendapat KP bahawa beliau mempunyai budi bicara mutlak di bawah s 12 AKS 1959 untuk mendaftar kesatuan sekerja tanpa berunding dengan mana-mana pihak adalah satu penghinaan kepada keadilan asasi, sepertimana kegagalanannya untuk memberikan sebab bagi keputusannya.

Diputuskan, sebulat suara menolak rayuan, mengesahkan keputusan MR dan menjawab persoalan berhubung kebenaran secara afirmatif:

- (1) Dalam keadaan kes di bawah mana budi bicara dilaksanakan oleh KP dalam mendaftarkan perayu sebagai kesatuan sekerja, peruntukan s 12 AKS 1959 telah tidak dipatuhi (lihat perenggan 91).
- (2) Dalam melaksanakan kuasa dan/atau budi bicaranya dan membuat keputusan di bawah s 12 AKS 1959, KP perlu mempunyai sebab untuk keputusan tersebut. Ia bukan keputusan yang tidak berguna dan budi bicara tidak boleh dilaksanakan sewenang-wenangnya. Dalam kedudukan itu, ia adalah munasabah dan sesuai untuk mengatakan bahawa KP patut telah memberikan sebab untuk keputusannya. Dia tidak berbuat demikian kerana dia di bawah kepercayaan yang salah (sepertimana dinyatakan dalam affidavit jawapannya) bahawa dia mempunyai kuasa budi bicara yang mutlak. Dia tiada sebenarnya. Terdapat keperluan selanjutnya untuk diputus dan dipertimbangkan oleh KP sebelum dia tiba kepada keputusannya. Terdapat sudah suatu kesatuan sekerja yang wujud bagi mewakili dan menyediakan pekerja dalam industri tertentu yang sama (iaitu, NUBE) dan ia patut disedari oleh KP bahawa kepelbagaian kesatuan sekerja berkaitan pekerjaan yang sama bukan untuk kepentingan harmoni perindustrian. Kepuasan KP di bawah s 12 AKS 1959 dalam memutuskan sama ada untuk mendaftar kesatuan sekerja lain dalam industri yang sama tidak boleh tercapai tanpa rundingan terdahulu dengan mereka yang dalam industri yang sama.

- A** NUBE mempunyai kepentingan dalam pendaftaran perayu dan jangkaan yang sah dan munasabah untuk didengar berhubung permohonan perayu tetapi ia telah dinafikan hak tersebut. Dalam keadaan itu, kegagalan untuk berunding dengan NUBE adalah mudarat (lihat perenggan 85 & 90).
- B** (3) Dalam mentafsir s 12 AKS 1959, dengan menggunakan cara tafsiran harfiah adalah tidak kena. Pentafrsiran yang membawa maksud dan bentuk s 12 patut dipertimbangan. Ia adalah peraturan utama tafsiran statut bahawa peruntukan perlu dibaca secara keseluruhan. Seksyen 12 AKS 1959 terdiri daripada tiga subseksyen dan ia perlu dibaca bersama dan secara keseluruhan. Untuk membaca sub-s (1) secara berasingan adakan membawa kepada maksud yang tidak semulajadi kepada peruntukan tersebut. Ia bukan cadangan undang-undang yang betul untuk menatakan bahawa s 12 tidak memerlukan rundingan sebelum KP boleh menggunakan budi bicaranya. Seksyen 12(2) AKS 1959 perlu ditafsirkan secara liberal oleh mahkamah. Di mana perkataan 'shall' terdapat dalam sub-s (3), penggunaan perkataan 'may' dalam dua subseksyen yang lain itu tidak memberikan KP kebebasan dalam menggunakan budi bicaranya sama ada atau tidak untuk mendaftar.
- E** Keputusan sama atau tidak untuk membenarkan pendaftaran melibatkan beberapa penimbangan dan pertimbangan pelbagai faktor. Dengan membaca sub-s (2), ia hanya masuk akal bahawa KP telah berpuas hati tentang fakta tertentu sebelum dia boleh bertindak. Bagi tujuan ia boleh dipenuhi, ia sekali lagi hanya masuk akal jika dia telah berunding dengan pihak-pihak berkaitan termasuk mereka yang terjejas dengan permohonan yang dibenarkan atau ditolaknya (lihat perenggan 56–57 & 69–70).
- F**
- G** (4) MR tidak terkhilaf kerana tidak mengikut keputusan terdahulunya dalam kes *ABOM*. Apabila MR memutuskan kes *ABOM*, sekurang-kurangnya dua keputusan terdahulu yang lain, satu oleh MR dan satu lagi oleh Mahkamah Agong, yang mana kedua-duanya mengikat MR, tidak dibawa kepada perhatiannya dan tidak pernah diambil kira atau dirujuk. Oleh itu, keputusan MR dalam kes *ABOM* jelas per incuriam tidak menghiraukan dua keputusan terdahulu itu jika ia memilih untuk berbuat sedemikian. Ia telah pun berbuat sedemikian. Dan dalam berbuat begitu, ia tidak melanggar doktrin stare decisis (lihat perenggan 48).]
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I Notes

For cases on purposive approach, see 11(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2057–2131.

For cases on registration, see 8(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2139–2145.

Cases referred to

- Association of Bank Officers, Peninsular Malaysia v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor* [2004] 7 MLJ 109, HC (refd) **A**
- Attorney-General v Thomas D'arcy Ryan* [1980] AC 718, PC (refd)
- Bar Malaysia v Index Continent Sdn Bhd* [2016] 1 MLJ 445, FC (refd) **B**
- Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and others* [1971] 1 All ER 1148, CA (refd)
- Cooper v The Board of Works for the Wandsworth Destrict* (1863) 14 CB NS 180 (refd)
- Council of Civil Service Unions And Others v Minister For The Civil Service* [1985] AC 374, HL (refd) **C**
- Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1, FC (refd)
- Doody v Secretary of State for the Home Department; and other appeals* [1993] 3 All ER 92, HL (refd)
- Duke v Reliance Systems Ltd* [1987] 2 WLR 1225, CA (refd) **D**
- Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12, SC (refd)
- Huddersfield Police Authority v Watson* [1947] 2 All ER 193, KBD (refd)
- Kammmins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, HL (refd) **E**
- Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193, CA (refd)
- Kesatuan Pegawai-Pegawai Bumiputra-Commerce Bank Bhd (Kepak Bumi-Commerce) v Association of Bank Officers, Peninsular Malaysia* [2007] 1 MLJ 37, CA (refd) **F**
- Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and another appeal* [2015] 4 MLJ 701, FC (refd)
- MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673, FC (refd)
- Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd) **G**
- Morelle Ltd v Wakeling* [1955] 1 All ER 708, CA (refd)
- Nothman v Barnet London Borough Council* [1978] 1 WLR 220, CA (refd)
- O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124, HL (refd) **H**
- Padfield And Others v Minister of Agriculture, Fisheries and Food And Others* [1968] AC 997, HL (refd)
- Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97, FC (refd)
- Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, FC (refd) **I**
- Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, FC (refd)
- Pepper (Inspector of Taxes) v Hart and related appeals* [1993] 1 All ER 42, HL (refd)

- A *Persatuan Pegawai-Pegawai Bank Semenanjung (M) (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2013] 7 MLJ 265, HC (refd)
Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & Ors [1989] 1 MLJ 30, SC (refd)
- B *Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2014] MLJU 1885; [2014] 5 CLJ 562, CA (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487, HC (refd)
- C *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)
Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42, SC (refd)
Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor [1987] 1 MLJ 124, SC (refd)
- D *United Hokkien Cemeteries, Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121, FC (refd)
Western India Automobile v The Industrial Tribunal, Bombay AIR 1949 FC 111, HC (refd)
Wiseman And Another v Borneman And Others [1971] AC 297, HL (refd)
- E *Workmen of Dimakuchi Tea Estate v The Management of Dimakuchi Tea* (1958) ILLJ 500 SC, SC (refd)
Workmen of Indian Standards v Management of Indian Standards Institution [1976] ILLJ 33, SC (refd)
Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA (refd)
- F **Legislation referred to**
Civil Law Act 1956 s 3
Interpretation Acts 1948 and 1967 s 17A
Trade Unions Act 1959 ss 10, 12, 12(1), (2), (3), 71A
- G **Appeal from:** Civil Appeal No W-02-(IM)-2530–11 of 2013 (Court of Appeal, Putrajaya)
- H *Porres Royan (C Sri Kumar and Jaqdesb Singh Johal with him) (Kumar Partnership) for the appellant.*
Ambiga Sreenevasan (Alex de Silva, Gajendran Balachandran and Deepa Morgan with her) (Bodipalar Ponnudurai De Silva) for the first respondent.
Suzana bt Atan (Senior Federal Counsel, Attorney General's Chambers) for the second respondent.
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Balia Yusof JCA:

A

THE PARTIES

[1] The appellant is an in-house union of Malayan Banking Bhd ('MBB') which was registered by the Ketua Pengarah Kesatuan Pekerja, the second respondent ('the DG') on 3 January 2011 pursuant to s 12 of the Trade Unions Act 1959 ('the TUA 1959'). The first respondent ('NUBE') is a national union representing non-executive employees in the banking industry including MBB.

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BACKGROUND FACTS

[2] On 3 March 2011, the DG registered the appellant as a trade union to represent MBB's non-executive employees. By a letter dated 28 January 2011 NUBE filed an appeal to the DG pursuant to s 71A of the TUA 1959 to cancel the registration of the appellant. Failing to get any response or decision on the appeal, NUBE filed an application for judicial review on 8 February 2011 to challenge and quash the decision of the DG for, inter alia, the following reasons:

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- (a) that the DG failed to afford NUBE an opportunity to be heard before proceeding to register the appellant as a trade union; and
- (b) the DG failed to take into account the scope of the appellant's membership which overlapped and/or is identical with the scope of membership of NUBE who are employed with MBB and enjoying the terms and benefits of the 16th Collective Agreement entered into between NUBE and Malaysian Commercial Banks Association.

F

[3] On 7 November 2013 the High Court dismissed NUBE's application for judicial review on the grounds that s 12(2) of the TUA 1959 gave the DG a wide discretion whether or not to allow the registration and that the same provision also does not provide for or require consultation before any decision to register is made. The High Court held that the DG was correct in arriving at his decision to register the appellant.

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DECISION OF THE HIGH COURT

[4] In dismissing NUBE's application for judicial review, the learned High Court judge concluded that the issue before the Court rests mainly, if not solely, on the application of s 12(2) of the TUA 1959. At paras 18 and 19 of the judgment, the learned High Court judge found:

I

[18] Further it is also my opinion that s 12(2) of Act 262 gives upon the first respondent wide discretion to allow or not to allow registration of a union. The use

- A the word ‘may’ in the subsection is testimony to this as opposed to the word ‘shall’ used in its sub-s (3). Refer to the Court of Appeal’s decision in *Ma Boon Lan v UOB Kay Hian Pte Ltd (previously known as Kay Hian Pte Ltd) and another appeal* [2013] 4 MLJ 848.
- B [19] Further, Act 262 does not provide or require any consultation before the first respondent can exercise his power to register. There is also nothing in the Act which prohibits the first respondent from registering the second respondent as an in-house union. In fact, I do not see any overlapping in the scope of membership of the applicant with the second respondent’s. The second respondent is merely an in-house union representing non-executive employees of MBB whereas the
- C applicant is an industry based union representing non-executive employees of all commercial banks in Malaysia. Hence, the second respondent’s role is more specific and it would be able to represent its members more effectively as it focuses only on one bank and would be more familiar with issues and problems faced within its jurisdiction as compared to the applicant which has a bigger focus as it represents 26
- D commercial banks with more than 30,000 members.

- [5] Aggrieved by the decision of the High Court, NUBE appealed to the Court of Appeal. By its decision on 17 September 2014, the Court of Appeal unanimously allowed the appeal and the decision of the DG was quashed in
- E consequence of which the registration of the appellant was set aside.

DECISION OF THE COURT OF APPEAL

- F [6] In allowing NUBE’s appeal, the Court of Appeal held that s 12 of the TUA 1959 must be read as a whole. Considering the purpose and intent of the legislation and adopting the purposive approach of interpretation, the Court of Appeal held that s 12 places an investigative role on the DG before coming to a conclusion. We append below an excerpt from the judgment of the Court of Appeal:
- G [17] Section 12(1) is not an administrative procedure per se and cannot be exercised mechanically. Section 12 places an investigative role on the first respondent before coming to the conclusion whether or not to register the trade union. The first respondent to do so must meticulously comply with s 12(2) as well as s 12(3)
- H though it is negatively worded. Where applicable and for this purpose the first respondent is duty bound to give notice to all necessary and interested parties to obtain their feedback to arrive at an opinion whether or not to register. Common sense and rule of natural justice will dictate that the views of the appellants ought to have been heard before deciding to register. Failure to strictly comply with the statutory obligations set out in the section will make the decision or decision
- I making process a nullity *ab initio* without the need even to consider the concept and parameters of judicial review (see *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Berhad* [1998] 1 MLJ 393). Support for the proposition is found in a number of cases, to name a few are as follows:

- (a) in *Attorney General v Ryan* [1980] AC 718, the Privy Council observed:

... the Minister was a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity.

A

(b) in *R v Commr of Racial Equality, ex p Hallingdon London Borough Council* [1984] AC 779, Lord Diplock stated:

B

Where an Act of Parliament confers upon an administrative body functions which involved its making affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions.

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[7] Further on, the Court of Appeal held:

[22] We find merits in the appellant's submissions as there is a gross failure on the part of the first respondent to satisfy the requirement of s 12 of the TUA 1959 and the affidavit in opposition of the respondents only confirms the gross failure.

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[23] Section 12(1) is not a passport for registration of trade union as of right, without going through the investigative procedure which we have stated above. Support for the proposition is found in the case of *Persatuan Pegawai-Pegawai Bank Semenanjung (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor* [2013] 7 MLJ 265 where His Lordship Abang Iskandar J (as he then was) in dealing with s 12 of the TUA 1959 at p 269 had this to say:

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[6] Clearly therefore there is, ipso facto, a desire to avoid a multiplicity of trade unions that would cater for the same particular occupation, in this case, that would be the executive officers of the commercial banks and that the DG may not register a trade union where there already exists a trade union that represents the workmen in the particular occupation. The caveat is put in a place when it is not in the interest of the workmen concerned that there be established another trade union in respect the same occupation. The words of the said section refer to the satisfaction on the part of the DG in deciding whether to register another trade union. But that satisfaction cannot be achieved without there be a prior act on the part of the DG to duly consider.

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[8] And continuing at para 25 in the judgment, the Court of Appeal concluded:

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[25] It is our judgment that before deciding to register or not to register the new union the first respondent must take relevant consideration such as competing interest of trade union and its effect, etc, as adumbrated by us earlier. If that has been done according to law and established principles then there is nothing the appellant can complain of. In the instant case it was not done.

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[9] Dissatisfied with the decision of the Court of Appeal, the appellant then filed an application for leave to this court and on 18 June 2015 leave was granted on the following question of law which reads:

A In considering an application for registration of a trade union in respect of a particular establishment, is there a statutory requirement on the part of the Director General under s 12 of the Trade Unions Act 1959 to consult with any existing trade union representing workman in that establishment, trade, occupation or industry.

B THE APPELLANT’S SUBMISSION

[10] In his submission before us, learned counsel for the appellant placed much reliance on the case of *Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2014] MLJU 1885; [2014] 5 CLJ 562 (hereinafter referred to as *ABOM 14*). The appellant relies on that case as an authority that the DG is under no obligation under s 12 of the TUA 1959 to consult NUBE before registering the appellant as a trade union, although NUBE is a national union currently representing the same category of employees sought to be represented by the appellant. In the aforesaid case, the Court of Appeal held that s 12 of the TUA 1959 imposes no obligation on the DG to hear or discuss with the appellant before making any decision under s 12(1) of TUA 1959. Learned counsel submitted that the Court of Appeal in the instant appeal although was referred to the case, had erred in departing from its own previous decision. The doctrine of precedent had been breached as none of the exceptions to the application of that doctrine as stated in the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 (FC) is applicable.

[11] Further submission of counsel touched on the issue of canons of interpretation. In interpreting s 12 of the TUA 1959, we were reminded that the court’s power is limited to interpreting the words used by Parliament and it has no power to fill in any gaps. In short, learned counsel is urging this court to adopt the literal interpretation of s 12 by just relying on the cold prints of the section. The words in s 12 are clear and unambiguous and the court must give effect to that meaning irrespective of the consequences.

NUBE’S SUBMISSIONS

[12] Learned counsel for NUBE submitted that the registration of a trade union by the DG under s 12 is not a mere mechanical process and in fact the DG does not act like a rubber stamp. The case of *ABOM 14* relied upon by the appellant is not binding on the Court of Appeal as it was decided per incuriam.

[13] On the powers and the discretion of the DG under the aforesaid provision, it was submitted that the discretion is not an unfettered one. The decision of the DG in registering the appellant without consulting and hearing NUBE was in breach of the principle of natural justice namely the *audi alteram partem* rule.

[14] Further, in public law litigation, it is settled principle that a public decision making body must afford reason, and the failure to give any reason for any decision made, offends the principle of natural justice. The failure of the DG to give any reason under the guise of exercising his absolute discretion accorded by s 12 of the TUA 1959 is, in the submissions of learned counsel, an affront to natural justice.

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THE DG'S SUBMISSIONS

[15] The learned senior federal counsel, appearing for and on behalf of the DG, in her short submission was of the view that the clear provisions of s 12 of the TUA 1959 restrains the court from going beyond the words used in the section. Given the plain meaning of the words used and adopting the literal interpretation of the words used, the DG was not in error in not consulting NUBE before registering the appellant as a trade union.

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OUR DECISION

[16] At the outset it is pertinent to note that no consultation was made by the DG in coming to his decision to register the appellant as a trade union. Learned counsel for the appellant had rightly conceded to that fact. The two affidavits in reply by the DG affirmed on the 29 May 2013 admitted that no consultation with NUBE was made. The two affidavits in reply were filed together in answer to NUBE's affidavit in support of the application for judicial review in the High Court. On the issue of consultation, the DG in para 13 of his affidavit stated:

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13. Bagi menjawab perenggan 16 affidavit pemohon, adalah diakui sememangnya tiada perundingan dilakukan di dalam mendaftarkan Responden kedua sebagai kesatuan sekerja bersama Pemohon, akan tetapi tiada peruntukan di bawah Akta Kesatuan Sekerja 1959/Akta 262 yang mewajibkan Responden Pertama berunding atau berbincang bersama Pemohon sebelum mendaftarkan Responden kedua sebagai kesatuan sekerja berdaftar.

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[17] It was also brought to our attention that from the facts gathered from the various affidavits filed in support of and in opposition to the judicial review applications, what has become clear is that the DG in this case had acted at an unprecedented pace. The application for registration by the appellant was received on 13 December 2010 and the pro tem committee of the appellant met with the representatives of the DG on 23 December 2010 to explain the justification for its registration. The registration of the appellant was made on 3 January 2011. According to NUBE learned counsel's submission, it was done within a period of six days. Taking into consideration the year end holidays and the weekend, the period taken by the DG to register the appellant must, in the circumstances of the case, have been done in the most hurried way. On the same token, we also noted that NUBE had acted equally swift by filing the

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A judicial review application within a matter of days after lodging an appeal against the DG’s decision. That aside, we will now deal with the issues raised and submissions made by the parties.

THE DECISION IN *ABOM 14*

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[18] Heavy reliance was placed by the appellant on the decision of the Court of Appeal in the abovesaid case. In that case, the Court of Appeal held that s 12 of the TUA 1959 imposes no obligation on the Ketua Pengarah Kesatuan Sekerja, Malaysia (the first respondent therein) to hear Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) (the appellant in that case) before making a decision under s 12(1). We shall now have a closer look at *ABOM 14*.

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D **[19]** The facts in *ABOM 14* may be stated as follows.

The appellant is a trade union registered under TUA 1959, whose membership is open to all workmen classified as Class II Officers and Internal Officers employed in banks which are members of the Malayan Commercial Banks’ Association (‘MCBA’). RHB Bank Bhd (‘RHB’) is a member of MCBA. The second respondent, Kesatuan Eksekutif RHB Bank Bhd had applied under s 10 of the TUA 1959 to be registered as an in-house trade union covering officers in category E1 to E4 in RHB. The Pengarah Kanan, Jabatan Hal Ehwal Kesatuan Sekerja Malaysia then wrote to the appellant requesting the appellant to list out the category and grades of officers that it represented in RHB. The appellant replied stating that any application to register an in-house union in RHB ought to be rejected because the appellant claimed that its membership covered all executives at RHB. However on 27 December 2010 the first respondent registered the second respondent as a trade union under s 12(1) of the TUA 1959. The appellant thereupon filed the application for judicial review.

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The appellant’s application seeking reliefs was premised on *Wednesbury* unreasonableness and non-compliance with the rules of natural justice by the first respondent in not affording the appellant a reasonable opportunity to be heard before registering the second respondent. The appellant said that the first respondent had failed to consider relevant facts, had taken into consideration irrelevant facts and had acted arbitrarily and in excess of jurisdiction. The appellant alleged that the first respondent had failed to:

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- (a) consider s 12(2) of the TUA 1959 which allows the first respondent to refuse registration where there is already in existence a trade union representing the workmen;
 - (b) consider that the appellant has members in executive capacity who are employees of RHB;

- (c) observe the rules of natural justice under s 12(2) of the TUA 1959; and A
- (d) consider the fact of multiplicity of unions resulting from such registration. B

Before the learned High Court judge, a preliminary objection was raised by the learned senior federal counsel acting for the first respondent that the appellant had failed to exhaust the remedy of appeal to the Minister provided for in s 71A of the TUA 1959 against any decision of the first respondent made under s 12 of the same.

The appellant contended that there are special circumstances that does not bar the application for judicial review notwithstanding the remedy of appeal to the Minister as provided for under s 71A of the TUA 1959. It was contended that special circumstances existed in this application because the first respondent had failed to observe the rule of natural justice by not calling the appellant for any discussion before considering the registration of the second respondent. C

The learned High Court judge found that under s 12 of the TUA 1959 there was no requirement for the first respondent to call for evidence whether orally or by document. There was no statutory obligation on the first respondent to discuss with any party before registering the second respondent and the court should not read what is not written in the law. D E

[20] On appeal to the Court of Appeal, the decision of the High Court was upheld. The Court of Appeal held that no obligation is imposed on the Ketua Pengarah Kesatuan Sekerja to discuss with the appellant before making a decision under s 12(1) of the TUA 1959. At para 9 of its judgment, the Court of Appeal held: F

[9] It is clear that s 12 imposes no obligation on the first respondent to hear the appellant before making a decision under s 12(1). Since under the law no obligation is imposed on the first respondent to discuss with the appellant before making a decision under s 12(1), no discussion need be called for. In the circumstances we agree with the learned judge that there is no breach of the *audi alteram partem* principle and consequently there are no special circumstances to justify the appellant's act of disregarding the provisions of s 71A. However we note that the first respondent vide its letter dated 19 August 2010 did notify the appellant of the second respondent's request and did request for the appellant to provide it with a list of the officers in RHB that it represents. G H

[21] The decision in *ABOM 14* was referred to the Court of Appeal in the instant appeal and as mentioned earlier, learned counsel for the Appellant submitted that the Court of Appeal had erred in departing from its own decision in the *ABOM 14* case. To date, that decision in *ABOM 14* has not been overturned by the Federal Court and as such is good law. The Court of Appeal is bound by its own previous decision. I

- A [22] It is trite that the doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decision of the courts of a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal (per Peh Swee Chin FCJ in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1).
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- C [23] The exception referred to by His Lordship Peh Swee Chin FCJ are as per the decision of the English Court of Appeal case of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The ratio decidendi in that case is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decision or by decision of courts of coordinate jurisdiction such as the courts of Exchequer Chamber. The Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* ruled that the said exceptions to the rule of judicial precedent ought to be accepted as part of the common law applicable by virtue of s 3 of the Civil
- D Law Act 1956.
- E [24] The three exceptions stated in *Young v Bristol Aeroplane Co Ltd* are firstly, a decision of the Court of Appeal given per incuriam; secondly when faced with a conflict of past decisions of the Court of Appeal, or a court of coordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, and thirdly it ought not to follow its own previous decision when it is expressly, or by necessary implication, overruled by the House of Lords or it cannot stand with a decision of the House of Lords. The Federal Court further cautioned that
- F there are of course further possible exceptions in addition to the three where there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane Co Ltd*.
- G [25] A similar stand on the three exceptions referred to above was again echoed in the decision of this court in *Parlan bin Dadeh v Public Prosecutor*.
- H [26] In our local context, the Federal Court should be substituted for the House of Lords with regard to the matter discussed above.
- I [27] Learned counsel for the appellant submitted that the Court of Appeal had erred in not following *ABOM 14* as it is a binding decision. Learned counsel for NUBE however submitted that *ABOM 14* was decided per incuriam and the Court of Appeal in the instant appeal was at liberty not to follow it. At least one of the exceptions to the doctrine of stare decisis as mentioned in *Young v Bristol Aeroplane Co Ltd* and followed in *Dalip Bhagwan Singh v Public Prosecutor* applies.

[28] The Latin term 'per incuriam' means through want of care, through inadvertence or by mistake. A decision given per incuriam is given 'in ignorance or forgetfulness' of an earlier relevant case or an inconsistent legislative provision. *Osborn's Concise Law Dictionary* (8th Ed) says a decision of the court is not a binding precedent if given per incuriam ie without the court's attention having been drawn to the relevant authority, or statute.

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[29] Lord Goddard CJ in delivering the judgment of the Court of Appeal in *Huddersfield Police Authority v Watson* [1947] 2 All ER 193 said at p 196 as follows:

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What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.

[30] In *Morelle Ltd v Wakeling* [1955] 1 All ER 708, Sir Raymond Evershed MR speaking on the same subject matter had in his judgment in the Court of Appeal said the following at p 718:

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As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene MR, of the rarest occurrence.

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[31] On the application of the doctrine, it is instructive to refer to the words of Sir John Donaldson MR in *Duke v Reliance Systems Ltd* [1987] 2 WLR 1225 when he said at p 1228:

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I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case, it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam, I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

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[32] The above quote was approved by our then Supreme Court in *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 and by the Federal Court in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673.

A IS THE DECISION IN *ABOM 14* PER INCURIAM?

[33] We had perused the decision of the Court of Appeal in *ABOM 14* and we have reproduced para 9 of the said judgment at para 20 of this judgment which says that no obligation is imposed on the Ketua Pengarah Kesatuan Sekerja to discuss with the appellant therein in making a decision under s 12 of the TUA 1959.

[34] Prior to *ABOM 14* case, s 12 of the TUA 1959 had been dealt with by the courts in a number of cases such as follows:

- (a) *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & Ors* [1989] 1 MLJ 30 (SC);
- (b) *Association of Bank Officers, Peninsular Malaysia v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor* [2004] 7 MLJ 109 (HC);
- (c) *Kesatuan Pegawai-Pegawai Bumiputra-Commerce Bank Bhd (Kepak Bumi-Commerce) v Association of Bank Officers, Peninsular Malaysia* [2007] 1 MLJ 37 (CA); and
- (d) *Persatuan Pegawai-Pegawai Bank Semenanjung (M) (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2013] 7 MLJ 265 (HC).

[35] Our perusal of the grounds of judgment of the Court of Appeal in the instant appeal reveals that all the above stated authorities had been referred to the court. So was *ABOM 14* case.

[36] We have examined *ABOM 14* with a fine toothcomb and we agree with the submissions of learned counsel for NUBE that none of those cases listed in para 34 above were referred to or considered by the Court of Appeal. The decision in *ABOM 14* is therefore clearly made in ignorance or without consideration of those cases.

[37] We shall now look at those authorities, starting with the decision of the then Supreme Court in *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & Ors*. The appellant in that case is a trade union of executive officers of commercial banks in Peninsular Malaysia established in 1978. In 1980 the appellant received recognition of 12 commercial banks in Peninsular Malaysia, including the fourth respondent, Malayan Banking Bhd ('the bank'). On 8 October 1986, the second respondent, the Registrar of Trade Unions, registered the third respondent, the Association of Maybank Officers ('the association') as a trade union of executive officers in the employment of Malayan Banking Bhd. Subsequently the bank gave recognition to the association (the third respondent) and withdrew its recognition to the appellant. The appellant being aggrieved by the

decision of the registrar appealed to the Minister but the appeal was dismissed. The appellant obtained leave of the High Court to apply for an order of certiorari to quash the decision of the Minister in dismissing the appeal, but this was refused. The appellant appealed to the Supreme Court. The Registrar of Trade Unions had stated that he registered the association (the third respondent) because he was satisfied that it is in the interest of the officers in the fourth respondent bank to register the third respondent as a trade union.

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[38] The Supreme Court in allowing the appeal held that sub-s (2) of s 12 of the TUA 1959 requires that the interest of the workmen in the particular occupation should be considered, not just the interest of the officers in the employment of the bank. The registrar had failed to correctly take into account the provisions of sub-s (2). The registration of the association was held to be a nullity.

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[39] What is clear to us from the reading of the above authority on the interpretation of s 12(2) of the TUA 1959 is that it was incumbent on the part of the registrar in registering the association to also take into consideration the interest of the workmen in the particular occupation. This failure is a breach of s 12(2) of the TUA 1959.

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[40] In our considered view, it is implicit in the said provision that the right to be heard at least by the process of consultation ought to be accorded to the other interested party. It is not sufficient for the registrar to consider the application without hearing and/or consulting others who may or will be affected by his decision.

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[41] Next we will consider the decision of Raus Sharif J (as he then was) in *Association of Bank Officers, Peninsular Malaysia v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor*. The facts of the case may summarily be stated in the following terms.

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Bank Bumiputra Malaysia Bhd ('BMB') merged with Bank of Commerce Malaysia Bhd ('BOC') to become Bumiputra Commerce Malaysia Bhd ('BCB') and Bank Muamalat Malaysia Bhd. There were already two registered unions in BOC, namely Kesatuan Kakitangan Eksekutif Bumiputra-Commerce Bank Bhd ('BOCESU'), an in-house union which represented officers in Grades 35 and 36, and Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia ('ABOM'), a national union which BBMB, that represented officers in Grade 34 to 39.

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Subsequently, the former employees of BBMB currently employed by BCB received acceptance by the Director-General of Trade Unions ('the first

A respondent') to register a new in-house union ('the second respondent') in BCB on the ground that it would be in the best interests of all parties to come under a single union.

B BOCESU and ABOM ('the applicants') applied separately to the court for certiorari to quash the decision of the first respondent on the ground that he had erroneously exercised his discretion. The second respondent contended that the applicants did not avail themselves of the remedies available to them under the Trade Unions Act 1959 and they had no locus to make the applications. The parties agreed that the suits would be jointly heard.

C [42] The applications by BOCESU and ABOM were allowed by the learned High Court judge on the ground that the Director-General of Trade Union (the first respondent therein) had not properly exercised his statutory discretion under s 12(2) of the TUA 1959. At para 19 of the judgment, the
D learned High Court judge opined:

E [18] It is not disputed that the first respondent has wide discretion as to whether he should or should not register the second respondent. Surely, if the respondent has acted within the provisions of the Act and has acted bona fide and considered relevant matters without abusing his powers, then that discretion cannot be reviewed by judicial review proceedings. But this is not the situation in this case. To me, the first respondent has not properly exercised his statutory discretion under s 12(2) of the Act. This is because the first respondent failed to consider the fact that the scope of the second respondent's membership was overlapping with the scope of membership of the applicants. This overlapping factor should have put the first
F respondent on guard because of s 12(2) which states:

G The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment, trade, occupation or industry and it is not in the interest of the workmen concerned that thus be another trade union in respect thereof.

H [43] The decision of the Supreme Court in *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & Ors* discussed earlier was cited and followed.

I [44] Speaking on the right to be heard and consultation, the learned High Court judge had this to say at paras 23–24 of his grounds of judgment:

[23] The first respondent in his affidavit has also stated he registered the second respondent in the interests of all parties and wanted to bring the unions under one umbrella. I am of the view that if that was the reason, then BOCESU and ABOM being the *interested parties should have been consulted and given the right to be heard* because the registration of the second respondent would have a direct impact and repercussion on the scope of BOCESU and ABOM. The question of whether a union should be given an opportunity be heard by the Director-General was

- ventilated in *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Union & Ors* [1990] 3 MLJ 231. In that case, whilst the recognition issue of the applicant union was pending for determination, the Director General registered the fourth defendant union. The employers (second and third defendants) accorded the fourth defendant recognition but withdrew its recognition to the applicant union. The issue that arose was whether the applicant union should have been given an opportunity of being heard before the Director General registered the fourth defendant, Edgar Joseph Jr SCJ invoked the concept of *legitimate expectation* of being heard in favour of the applicant union when he said:
- Applying the principle to the fact disclosed in the statement of claim, I am satisfied that it was certainly arguable that the plaintiff could invoke the concept of legitimate expectation of being afforded an opportunity of making representations before the first defendant proceeds to register the fourth defendant as a trade union ...
- [24] In our present case the first respondent has not given the applicants an opportunity of being heard before the registration of the second respondent. Surely, there was a *reasonable expectation that the first respondent would call BOCESU and ABOM to give their views and their representations before the registration of the second respondent* which would be representing employees in Grade 34 to 36 who are within the scope of membership. A reasonable person similarly circumstance would have anticipated that trouble would brew between the unions because the registration of the second respondent would cause dissatisfaction among the employees of BDB, especially Grade 34 to 36, and the existing unions in BCB. It is for that reason that the first respondent should have afforded BOCESU and ABOM and opportunity to be heard before the registration of the second respondent. (Emphasis added.)
- [45] This decision of the High Court was affirmed by a unanimous decision of the Court of Appeal in *Kesatuan Pegawai-Pegawai Bumiputra-Commerce Bank Bhd (Kepak Bumi-Commerce) v Association of Bank Officers, Peninsular Malaysia*.
- [46] From our scrutiny, the decision of the Court of Appeal in the *Kepak Bumi-Commerce* case was also not referred to by the Court of Appeal in *ABOM 14*. Neither was the High Court case.
- [47] For completeness sake, we are constrained to refer to a more recent High court decision in *Persatuan Pegawai-Pegawai Bank Semenanjung (M) (ABOM) v Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* referred to in the list of cases dealing with s 12 of the TUA 1959 in para 34 above. The learned High Court judge (as he then was) in that case in dealing with the provisions of s 12 of the TUA 1959 spoke in a similar vein on the duty of the Director-General to consider the interest of other interested parties before registering a trade union.

A [48] Given that background, it is abundantly clear that when the Court of Appeal in the *ABOM 14* case decided the matter, at least two other earlier decisions, one of the Court of Appeal and the other of the Supreme Court, were not brought to its attention and were never considered or referred to. These two authorities are binding on the Court of Appeal. As such, the decision in

B *ABOM 14* was clearly decided per incuriam as it was given in ignorance of those two earlier binding decisions. As rightly submitted by learned counsel for NUBE, the Court of Appeal in the instant case did not err in departing from the decision in *ABOM 14*. When faced with a situation where there are conflicting decisions, the Court of Appeal is free and is entitled to depart from

C the decision in *ABOM 14* and rely on the two earlier decisions if it so chooses. And it did. It was not in breach of the doctrine of stare decisis in so doing.

D [49] Still on the issue of departure from the decision in *ABOM 14*, learned counsel for NUBE further submitted that *ABOM 14* can be clearly distinguished on the facts with the case before us now, a minor point though. Before registering the second respondent therein, the DG in the *ABOM 14* case vide a letter dated 19 August 2010 did notify the appellant of the second respondent's request for registration and did request for the appellant to

E provide it with a list of the officers in RHB which it represents. The appellant was therefore given an opportunity to explain and be heard. But not NUBE in the instant appeal. On that note, we find the submission of learned counsel to be tenable. A distinction may indeed be drawn between these two cases.

F [50] In the upshot, we find no merits in the submissions of learned counsel for the appellant on the issue of the Court of Appeal erring in not following and in departing from the decision of *ABOM 14* on the duty of the DG to consult or to refer to parties in exercising his discretion under s 12 of the TUA 1959.

G INTERPRETATION OF S 12 OF THE TUA 1959

H [51] To start with, it would be pertinent to highlight some of the basic principles followed by the court in giving an interpretation to statutes passed by Parliament.

I [52] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision. *Craiese on Legislation* (9th Ed, 2008) at p 611 states:

The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation 'according to the intent of them that made it' and that intent is to be deduced from the language used.

[53] An observation by Abdul Hamid Omar LP in *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 on the different methods of interpretation adopted by the courts may serve as a good reminder:

We hasten to add that we are conscious that there are two schools of thought relating to statutory interpretation. Lord Denning favoured a creative role for judges, taking on themselves the task of ascertaining the purpose of an Act and the ironing out of creases which may appear. Lord Denning has observed in *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481 at p 499 that:

... it would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which give rise to it and of the mischief which it was passed to remedy and when he must supplement the written word so as to give 'force and life' to the intention of the Legislature.

The other school, notably Lord Simonds, did not share Lord Denning's approach and argued against such a creative role preferring to leave all aspects of the legislative function to Parliament, 'if a gap is disclosed, the remedy lies in an amending Act' (*Magor & St Mellons RDC v Newport Corp* [1952] AC 189).

In the same case, Lord Morton of Henryton remarked that:

In so far as the intention of Parliament or of ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the Legislature.

While we respect both schools, we do not really have to prefer any of these opinions. We also need not dwell much on various rules and aids to construction of statutes except to say in general, that we have always been inclined to follow purposive and literal constructions which means that the literal meaning of an Act will be followed where that meaning is in accordance with the legislative purpose (see the decisions in *United Hokkien Cemeteries Penang v Majlis Perbandaraan Pulau Pinang* [1979] 2 MLJ 121; *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449).

[54] Taking centre stage in this appeal is on the interpretation to be accorded to s 12 of the TUA 1959.

[55] For ease of reference it would be helpful to refer to s 12 of the TUA 1959 which reads as follows:

12 Registration

(1) The Director General may, upon receiving any application under section 10, and subject to this section, register the trade union in the prescribed manner.

- A** (2) The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.
- B** (3) The Director General shall refuse to register a trade union if —
- (a) He is of the opinion that the trade union is likely to be used for unlawful purposes or for purposes contrary to or inconsistent with its objects and rules;
- C** (b) Any of the objects of the trade union is unlawful;
- (c) He is not satisfied that the trade union has complied with this Act and of the regulations;
- (d) He is satisfied that the objects, rules, and constitution of the trade union conflict with any of the provisions of this Act or of any regulations; or
- D** (e) The name under which the trade union is to be registered is —
- (i) Identical to that of any other existing trade union, or so nearly resembles the name of such other trade union as, in the opinion of the Director General, is likely to deceive the public or the members of either trade union; or
- E** (ii) In the opinion of the Director General, undesirable, unless the trade union alters its name to one acceptable to the Director General.
- F** [56] In interpreting s 12 of the TUA 1959, an interpretation which meets the purport and design of that provision ought to be considered. It is a cardinal rule of interpretation of statutes that the provisions must be read as a whole. Section 12 of the TUA 1959 consists of three subsections and in our view all the same must be read together and as a whole. To read in isolation sub-s (1) of the same would lead to an unnatural meaning to that provision. It was contended by the appellant's learned counsel that the words of sub-s (1) is clear and unambiguous and thus its plain natural meaning must be given effect. That in our view may be so if and only if that is the only provision in the said section. Regard must also be given to the other clauses of the provision in order to give the true purport and meaning of that section.
- G**
- H**
- I** [57] On the interpretation to be accorded to the said provision, the Court of Appeal had stated that, the TUA 1959 is a piece of social legislation to promote, preserve and protect the employees and employee's right as well as the employer's right to create industrial harmony. The object of trade unions whether in-house or national, is to regulate the relationship between employers and employees and in particular the rights of its members. The industrial court, dealing with the matters referred to it shall act according to equity and good conscience. Section 12(2) of the TUA 1959 must not be read in isolation and

must be liberally interpreted by the courts.

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[58] In this respect, reference must be made to the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 where the Court of Appeal had taken the approach that a judicial arbiter should not place an interpretation upon any Act of Parliament which has the effect of producing a result opposite to that intended by the collective will of the Legislature as gathered from the words of the legislation. An interpretation which would advance the object and purpose of the legislation must be the prime consideration of the arbiter, so as to give full meaning and effect to it in the achievement to its avowed social objective.

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[59] Taking this approach, the court stated at p 334 (MLJ); p 758 (CLJ) of the report:

In my judgment, this approach when applied to the interpretation of welfare of social legislation demands that such legislation must ex necessitate rei receive a liberal interpretation in order to achieve the object aimed at the Parliament. There is respectable authority that supports this views.

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[60] In support of such proposition, the court also referred and cited a number of authorities such as: (i) *Western India Automobile v The Industrial Tribunal, Bombay* AIR 1949 FC 111; (ii) *Workmen of Dimakuchi Tea Estate v The Management of Dimakuchi Tea* (1958) ILLJ 500 SC; and (iii) *Workmen of Indian Standards v Management of Indian Standards Institution* [1976] 1 LLJ 33. We are inclined to agree and support that proposition and hasten to add that it is trite law.

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[61] When Parliament confers powers on the DG, it is expected that such powers will be used to promote the policy and objects of the TUA 1959. And this intended object and policy can only be determined by the construction of the words in the statute. This is a matter of law for the courts to decide. Whenever it appears that the effect of his decision frustrates the policy and object of the statute, the courts are entitled to intervene (per observations by Lord Morris of Berth-y-Gest in *Padfield And Others v Minister of Agriculture, Fisheries and Food And Others* [1968] AC 997 and Lord Diplock in *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124).

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[62] We pause here to state that literal interpretation per se is not the only applicable rule to interpret statutes. Section 17A of the Interpretation Acts 1948 and 1967 (Act 388) for example provides that:

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17A Regard to be had to the purpose of Act

- A In the interpretation of provision of an Act, a construction that would promote the purpose of object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
- B [63] This court, in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 had stated:
- C When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein.
- D [64] The same view was again expressed by this court in *Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and another appeal* [2015] 4 MLJ 701.
- E [65] In the most recent case of *Bar Malaysia v Index Continent Sdn Bhd* [2016] 1 MLJ 445 this court had again reiterated the principles laid down in the above two cases and held that in considering the intended purpose of the statute, the courts are not confined to undertake a literal interpretation of the words therein but are permitted to construe the purpose in the context and scheme of the relevant Act as a whole.
- F
- G [66] Still on literal interpretation of statutes, earlier, Chang Min Tat FJ in *United Hokkien Cemeteries, Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121 citing what Lord Diplock said in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 had stated that the literal method of construction is now completely out of date and has been replaced by a 'purposive approach'. His Lordship went on to say that this purposive approach is not a modern fashion. Since the 17th Century, it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it'.
- H
- I [67] Lord Denning MR in *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 at p 228 observed:
- In all cases now in the interpretation of statute, we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.

[68] A similar view was further echoed in the speech delivered by Lord Griffiths in *Pepper (Inspector of Taxes) v Hart and related appeals* [1993] 1 All ER 42 at p 50 that:

The object of the Court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature ...

The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language.

The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

[69] Adopting the views and approach as stated above, it is our considered view that in interpreting s 12 of the TUA 1959, to take the literal method of interpretation would certainly be misplaced. We agree with the view taken by the Court of Appeal that it is not a correct proposition of law to say that s 12(1) of the TUA 1959 does not require consultation before the DG can exercise his power.

[70] While the word 'shall' appears in sub-s (3), the use of the word 'may' in the other two subsections does not give a free hand to the DG in the exercise of discretion whether to register or not. We recognise that in the exercise of his discretion by the DG there is no simple formula or rule of thumb which will readily and easily produce the proper result. But in order to arrive at a decision whether or not to allow the registration, it must involve some weighing of and consideration of various factors. Reading sub-s (2), it only makes sense that the DG needs to be satisfied of a certain fact before he may act. In order to be so satisfied, it only again makes sense that he has to consult the relevant parties making the application or likely to be affected by his allowing or refusing the application. How does the DG satisfy himself if not by getting further information and so forth and without consulting or engaging the relevant parties?

[71] The Court of Appeal in allowing NUBE's appeal against the decision of the High Court had aptly commented that the DG is 'duty bound to give notice to all necessary and interested parties to obtain their feedback to arrive at an opinion whether or not to register. Common sense and rule of natural justice will dictate that views of the appellant ought to have been heard before deciding to register.' (para 17 of the Court of Appeal judgment).

[72] Lest we forget, natural justice is a universal concept and must be observed at all levels especially when an individual or a body having power to determine questions affecting the rights of other individuals. We say not only common sense dictates that the views of NUBE ought to be considered but it

- A is also implied that the principles of natural justice (in this case the right to be consulted) must be observed. The position of the DG in this case may be likened to that of the Minister in *Attorney-General v Thomas D'arcy Ryan* [1980] AC 718 where the Privy Council observed:
- B ... the minister was a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a *necessary implication* that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity. (Emphasis added.)
- C [73] Authorities are in abundance to support the view that the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. Lord Guest in *Wiseman And Another v Borneman And Others* [1971] AC 297 (HL) had reiterated that 'This implication will be made upon the basis that Parliament is not to be presumed to take away parties' right
- D without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly'. In that case, the dictum of Byles J in *Cooper v The Board of Works for the Wandsworth District* (1863) 14 CB NS 180 was quoted as a clear proposition to this effect and which has been followed in many subsequent cases in England.
- E [74] The duty to consult, which essentially is a duty to give a hearing and the need to give reasons by decision making bodies goes hand in hand. They must go together. In *Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and others* [1971] 1 All ER 1148
- F Lord Denning observed that where a person 'has some right or interest, or some legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him accordingly, as the case may demand'. This view was earlier followed by this court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 (FC).
- G [75] It is acknowledged that the power given under s 12 of the TUA 1959 to the DG involves an exercise of discretion. The exercise of such discretion is not one which may be exercised with impunity and without any check and balance.
- H It would be most appropriate to quote the oft-quoted statement of Raja Azlan Shah CJ (as His Royal Highness then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 which goes to say:
- I Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when

government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Danckwerts LJ in *Bradbury v London Borough of Enfield*).

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[76] Earlier, Lord Denning in the *Breen's* case also observed that:

The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. This established by *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, which is a landmark decision in modern administrative law.

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[77] The DG has taken the view that he has an absolute and an unfettered discretion whether or not to register the appellant. In his affidavit in reply and as submitted by the learned senior federal counsel, the DG has 'kuasa budi bicara yang mutlak'. Quoting para 11 of the DG's affidavit in reply it states:

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11. Merujuk kepada perenggan 14 dan 15 Affidavit Pemohon adalah ditegaskan bahawa Responden Pertama mempunyai kuasa budi bicara yang mutlak sama ada untuk menerima atau menolak satu satu permohonan untuk memeriksa dan mendapatkan salinan sijil Pendaftaran dan kuasa tersebut adalah termaktub di bawah akta Kesatuan Sekerja 1959/Akta 262.

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[78] The stand taken by the DG is in clear contradiction and goes against the very grain of the remarks made by the two eminent judges in the person of the late Raja Azlan Shah CJ (as His Royal Highness then was) and Lord Denning MR that, unfettered discretion is a contradiction in terms.

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[79] The law does not impose an onerous burden on the decision maker to hear a party in all cases. But, as Lord Denning says in the *Breen's* case, it should be considered accordingly as 'the case may demand' or in a 'proper case'. What is a 'proper case' is a question of fact. In our view, in light of the discretion given to the DG as interpreted under s 12 of the TUA 1959, such an opportunity ought to have been given to NUBE.

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[80] We are mindful and very certain that we are not inventing fancied ambiguities in the provisions of s 12 of the TUA 1959. Our approach in interpreting the said provision is merely to keep abreast with the development of time and the liberal approach of interpretation towards social legislations.

A We dismiss learned counsel's submission that we are herein filling the gaps in the legislative provision.

B [81] We are further fortified by the decision of the Supreme Court in *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 that where there is no provision or requirement for due enquiry which essentially is the requirement to hear parties, then all that was necessary was a fair and reasonable decision in the exercise of the discretion under the law. A fair and reasonable decision under s 12 of the TUA 1959 in our view may only be given by affording the parties a fair hearing which may take the form of consulting an interested party, namely, NUBE, the first respondent in this appeal.

D [82] This court had on an earlier occasion in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* said that people expect fairness in their dealings with those who make decisions affecting their interests. Natural justice, it has been said, is only 'fair play in action'.

E [83] It is well settled that a body which is entrusted by statute with a discretion, must act fairly. It matters not whether its function is described as judicial or quasi judicial or administrative in nature. Still it must act fairly. A fair opportunity of being heard is so fundamental to any civilised legal system and that it is only right to expect that such an opportunity be given to NUBE.

F [84] On the duty to act fairly, Lord Roskill in the House of Lords case of *Council of Civil Service Unions And Others v Minister For The Civil Service* [1985] AC 374 at p 415 stated:

G The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled.

H The introduction of the phrase 'reasonable expectation' into this branch of our administrative law appears to owe its origin to Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170 (when he used the phrase 'legitimate expectation'). Its judicial evolution is traced in the opinion of the Judicial committee delivered by my noble and learned friend, Lord Fraser of Tullybelton, in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636–638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective 'legitimate' in this context and use it in this speech even though in argument it was the adjective 'reasonable' which was generally used. The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many

- forms. One may be an expectation of prior *consultation* (Emphasis added.) Another may be an expectation of being allowed time to make representations especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure.
- [85] NUBE, the first respondent in the instant appeal has an interest in the registration of the appellant and had a legitimate and reasonable expectation to be heard at least by being consulted on the application. NUBE was denied that right.
- [86] It is also settled public law principle and principle of natural justice that a public decision making body is under a duty to give reasons for its decision. Indeed, a reasoned decisions can be an additional constituent of the concept of fairness (*Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 and *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193). The giving of reason is also one of the fundamentals of good administration.
- [87] The absence of any provision in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reason unless that very statute specifies that no reason needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.
- [88] In a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then, perhaps the need to give reason by the decision maker may not arise. The circumstances arising in the particular case may by implication, demand the imposition of the duty to give reasons. Lord Mustill in the House of Lord case of *Doody v Secretary of State for the Home Department; and other appeals* [1993] 3 All ER 92 said:
- I accept without hesitation ... that the law does not at present recognize a general duty to give reasons for an administrative decision. *Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied.* (Emphasis added.)
- [89] In our view, in exercising his powers and/or discretion and making a decision under s 12 of the TUA 1959 the DG must have a reason for that decision. It is not a fanciful decision and the discretion can never be exercised willy nilly. Being in that position, it is reasonable and appropriate to imply that he ought to have given reason/s for his decision. He did not do so, for he was

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A under the erroneous belief (as stated in his affidavit in reply) that he has ‘kuasa budi bicara yang mutlak’. He has not.

[90] The circumstances as borne out from the facts of the case as disclosed from the affidavits in support and in opposition of the application, demonstrate the need for further deliberation and consideration by the DG in arriving at his decision. There is already an existing trade union representing and catering for the same particular industry and it ought to have dawned upon the DG that multiplicity of trade unions in respect of the same occupation would not be in the best interest of industrial harmony. In our view the satisfaction of the DG as provided under s 12 of the TUA 1959 in deciding whether to register another trade union in the same industry cannot be achieved without there being a prior consultation with the other players in the industry. NUBE which is an existing trade union representing workmen in the banking industry was not consulted. In the circumstances of the case, failure to do so is fatal.

[91] For the reasons above stated, in the totality of the matter and the circumstances of the case under which the discretion was exercised by the DG in registering the appellant as a trade union, we find the provisions of s 12 of the TUA 1959 had not been complied with.

[92] We answer the question posed in the affirmative.

F [93] The appeal is hereby dismissed and the decision of the Court of Appeal is affirmed.

G [94] Composite costs of RM50,000 is ordered against the appellant to be paid to the first respondent only, subject to the payment of allocator. Deposit to be refunded.

Appeal dismissed, the COA’s decision affirmed and the leave question answered in the affirmative.

H Reported by Ashok Kumar

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